liability could be determined through adjudication. The question, rather, was whether or not there was objectively discernible fair warning to a Defendant that the conduct complained of was unlawful. See, *Hope v. Pelzer*, 536 U.S. 730 (2002). In the instant case, the Respondents were fairly warned that removing involuntarily an appointed Assistant Clerk-Magistrate, without hearing and without cause, was an unlawful act. Respondents are misguided in urging that *Bishop v. Woods*, 426 U.S. 341 could fairly be applied to adjudge this case. Petitioner is not a police officer, an employee of a political subdivision of a state. Petitioner holds a statewide, legislatively created office. While the Court inherently possesses some amount of control over certain of an Assistant Clerk's internal court functions, See, *First Justice of Bristol Division of the Juvenile Court Department v. Clerk-Magistrate of the Bristol Division of the Juvenile Court Department*, 438 Mass. 387 (2003), it is neither free to create the position of Assistant Clerk, nor may it, Petitioner suggests, unilaterally abolish the position as suggested by the Respondents under a 'reorganization' theory. Neither may the Court direct the Assistant Clerk in his magisterial capacity to decide issues to the liking of the court. As the courts must exercise restrained independence, so also must the magistracy be empowered to do likewise in order to ensure the continuing integrity of judicial operations at inferior levels. There must be some limitation to the Court's authority over such an appointed officer. The Separation of Powers doctrine set out under Article XXX of the Massachusetts Constitution indicates that only the Massachusetts Legislature may abolish a presumptively constitutional, appointive office which it created. This ensures that the acts of a Legislature are normally viewed by the courts as being presumptively valid unless found to be constitutionally offensive. The mere fact that an Assistant Clerk's position is created so as to serve within a court does not imply that the protections crafted together with the appointing language by an equal and coordinate Legislature

are rendered void or voidable by the judiciary in an exigent situation. There has been such a perceived overlap between the branches since the time of Publius. The Petitioner was not, contrary to the contention of Respondents, an "at-will" employee of the Massachusetts Trial Court. Petitioner was appointed pursuant to statutory authority set forth at M.G.L. c. 218, § 10. That statute provides in pertinent part:

> "Assistant Clerks who were appointed under authority of this section, who are paid by the Commonwealth, and who have held said appointment for three consecutive years prior to the effective date of this act shall hold office during good behavior, but subject to applicable retirement laws, and may be removed from office under procedures authorized by section eight of [M.G.L. c. 211B, § 8].

Respondents initially argued the proposition that this Act, approved by the Legislature and signed into law in 1978, known as The Court Reorganization Act of 1978," (hereinafter, the "Act") was intended to apply retroactively three years to 1975 and did not afford prospective protection to Assistant Clerks beyond 1978. However the 'Act' had been republished in each successive year, at least until 1992, well past the date of Petitioner's appointment. Hence, the "Act," Petitioner suggests, became the "act" for the purposes of interpretation of each of the following years in which it was republished. Respondents' counsel at some point admitted to the validity of this interpretation in the case papers, and agreed that Petitioner was one who would fall within the parameters of those who would benefit from the provisions of the statute. Importantly, the statute provided also that:

> "An officer or employee whose appointment is subject to the provisions of this section may be removed for cause by the appointment authority. Every removal of an officer or employee whose appointment was subject to the provisions of this section shall be reviewed by the committee [The Advisory Committee on Personnel Standards, established above in the same section.] and no such removal shall be final until approved by the committee. If any such officer or employee has served three full years in a position, appointment which is subject to the provisions of this section, he shall have the right to appear personally before the committee reaches its decision as to whether or not to affirm his removal."(Bracketing & Underlining added).

Acts, 1978 – Chapter 478, Section 8, at pg. 636.

There is no exception set out in the above statute by which means the Respondents could fairly conclude that they could justifiably dispense with the requirement for due process set out therein. It would appear that the Legislature intended that Judges and Assistant Clerks continue to be paid even in times of fiscal constraint. The law further provides:

> "Notwithstanding any other provision of this act, appointive personnel employed in the judicial system of the commonwealth shall continue to serve therein without reduction in compensation and without loss of seniority, vacation or retirement rights."

Acts, 1978 Chapter 478, Section 328, at pg. 731.

Section 328 was re-enacted by Legislative republication and has not, so far as Petitioner perceives, either been stricken or modified. The Petitioner therefore should have been protected by this language. The Respondents should not be allowed to rely upon claimed ignorance of either the existence or meaning of the above language. As a practical outworking of that scenario, where the budget allocation to a particular court is sufficient to compensate the Judges, they should be paid firstly, then Clerks and Assistant Clerks. Any functions performed by staff would arguably be assumed by the Assistant Clerks, who clearly preceded non-appointive union employees in the historical structuring of the court system. This is not to denigrate the importance of any such union employee, but is only intended to contrast the importance of ensuring the integrity of the offices held by appointive judicial personnel, as mandated by the Legislature.

The intent to so protect Assistant Clerks might fairly have been gleaned by the Respondents, if not from the express language of the appointing statute, then from at least one other well-known source. In 1976, Archibald Cox, more commonly associated with the Watergate Scandal, was selected to Chair the Massachusetts Governor's Select Committee on Judicial Needs. This Committee published the "Report on the State of The Massachusetts Courts" in December of 1976. (hereinafter, "Cox Report")[1]

Chairman Cox, and other contributors worked diligently to improve and transform the Massachusetts Court system. Following are some of his words regarding clerks of court:

> "The office of clerk of court, for example, is both administrative and magisterial in nature, yet it is often conceived in its purely ministerial aspects of preparing dockets and recording judgments. The clerk, in the

[1] Worcester County Law Library, Dewey: HIST KFM 2908.A843, Published Dec. 1976.

> capacity of magistrate, might well be assigned to handle a wide range of judicial duties in preliminary matters, e.g., ruling on requests for continuances, ordering defaults, presiding over the pre-trial call of lists. Such matters presently consume the valuable bench time of judges. Eventually, application of the clerk's magisterial role might well be extended to include supervision of settlement conferences in "small claims" cases, the hearing of charges of minor vehicle violations, and similar matters. In this connection, serious consideration should be given to changing the title "clerk of court" to..."magistrate" or "administrative magistrate." The title "clerk of court" is an ancient one. Although once highly honorific it has become less honorific with the passage of time; the word "clerk" now connotes passivity and subservience. This very connotation may, in individual cases discourage the development of initiative, administrative capacity and magisterial discretion."

Cox Report, at pp. 48-49.

As foreshadowed, Assistant Clerks were given by the Legislature in 1992 the equitable powers of a Superior Court Judge when adjudicating Small Claims cases.

> In the hearing and disposition of any claim for money damages within the jurisdiction of such procedure, the Boston municipal and district court departments shall have all equity powers and jurisdiction conferred by sections one, one A and two, and clause (1) of section three of chapter two hundred and fourteen.

M.G.L. c. 218, § 21, Final Clause.

Chairman Cox also wrote:

> The Clerks...who undertake the professional training and achieve mastery of their duties should not be subject to dismissal from office for political reasons.

Cox Report, at pp. 50-51

The Respondents wish the Courts to conclude that the office of an Assistant Clerk is an "at-will" employment situation as exists in the business world: It is surely not of that genus. The Cox Report states otherwise. The provisions set out in the appointing statute state otherwise. And there is a verifiable paper trail to establish inferentially this point. Petitioner suggests that the legislative history is not vacuous as represented by the Respondents. Massachusetts Legislative Committees do not always generate reports on their deliberations. Significantly, the Cox Report provides reliable, compelling, foundational information as to the intended meaning of Acts of 1978, Sections 8 and 328 as incorporated within M.G.L. c. 218, § 10.

Specifically, it is both the composition of, and the listing of the uniquely qualified Members of "The Governor's Select Committee on Judicial needs" (Published in December, 1976) that provides a key, ascertainable link to interpreting the appointing statute.

The Committee List contains such names as Francis X. Bellotti, former Attorney General of Massachusetts; and, more importantly, it includes the name of the Late G. Joseph Tauro, who, coincidentally, is the father of Hon. Joseph L. Tauro, the Chief Judge of the Federal District Court for the District of Massachusetts, the Judge to whom Petitioner's case was assigned.

Judge G. Joseph Tauro was the first Judge to have been appointed as both Chief Justice of the Massachusetts

Superior Court Department, and also as Chief Justice of the Supreme Judicial Court of Massachusetts, the office which he held in 1976, the same year the Cox Report was published. A MEMORIAM was set down in the Massachusetts General Laws, in his honor, detailing many of his accomplishments. See, *Office of the Reporter of Decisions, Memorials*, 421 Mass. 1603 (1976).

Thus, it can be shown that it was the view of the Committee, as expressed by Chairman Cox, that Clerks' offices are significant, should be honored, and that Clerks should not be dismissed for political reasons. In Judge G. Joseph Tauro's Memorial, it is stated that

> "He was a leader in the successful movement of 1976-1977 for legislation to reorganize the Massachusetts courts."

Ibid.

Given the fact that the Chief Justice Tauro of the Supreme Judicial Court was a prominent member of the 1976 Governor's Select Committee it seems almost a certainty that the legislative committees, whether Judiciary, Ways and Means among others, and the Legislature as an enacting Body, both considered and deliberated upon the Cox Report --commissioned for the very purpose of restructuring the Massachusetts Court system--and that the Court, prior to 2002, and hence, also the Respondents, had actual and clear notice of the legislative intent behind, and the undergirding principles embodied in M.G.L. c. 218, § 10 respecting the 'tenure' of Assistant Clerks. That's being the case, your Petitioner suggests that a reasonable inference can be drawn that the Chief Justice for Administration and Management of the Trial Court of Massachusetts, a Superior Court Justice herself, as well as the other Judges-Respondent, many of whom were sitting judges at the time the 1978 Act was passed, were aware of the legislative intent with which

M.G.L. c. 218, § 10 was imbued. The language of the appointing statute was unambiguous. The Legislature established that Assistant Clerks "shall hold office during good behavior," by using words identical to those found in Massachusetts' Judicial Commissions, words granting to Judges the same protection likewise provided to Assistant Clerks in order to insulate them from political pressures that would impact upon the discharge of their duties. This is not an argument arising from pride or self-elevation. Petitioner perceives and embraces the inferior position of his office with respect to that of a Judge. But that does not change the nature of Petitioner's appointment. The text and history of the appointing statute fairly establishes that the office of Assistant Clerk, moreso with its magisterial component, is not an at-will position. The Respondents *parens patriae* are charged with awareness of the history of the appointing statute presented above that was readily ascertainable by any interested inquirer. They are charged with knowing state and federal law. They knew that the Petitioner held a property interest under established U.S. Supreme Court and First Circuit case precedent, and that depriving him of his livelihood was both a wrong and unconstitutional thing to do, especially without affording him any hearing on the matter as mandated by the statute, without exception. See, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532. (1985).

II. THIS COURT SHOULD FIND THAT, IN THE ABSENCE OF ANY RECORD ON THE ISSUE IN THE DISTRICT COURT BELOW, THE COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN AFFIRMING THAT COURT'S DISMISSAL OF THE CASE ON BOTH THE GROUNDS OF QUALIFIED IMMUNITY AS WELL AS MOOTNESS

The Panel of the First Circuit Court of Appeals has found that the Respondents have violated Petitioner's constitutional rights. Petitioner urges this Court to adopt that finding as its own. Opinion of the Panel, at pg. 2, App. The Panel went on, however, to find that the requirement of providing a hearing prior to removing an Assistant Clerk from office pursuant to a 'layoff' was not clearly established in the law and Respondents did not know that what they were doing was unconstitutional.

Petitioner has a protected property interest in his office. This is made more apparent when one considers the relative positions of the injured: In *Loudermill*, the injured party had either lied, was mistaken, or had conveniently forgotten that he had been convicted of Grand Larceny when filling out his job application. Discovering the truth, the employer terminated the security guard. A state statute provided for a post-discharge hearing. The facts of Petitioner's case are more compelling than those in *Loudermill*. Here, the injured party is a life-time magistrate of a state district court, and the statute under which he was appointed specifically provided at the time of his being removed that "[N]o such removal shall be final until approved by the committee." Acts, 1978, Section 8, at pg. 636. A layoff, according to Merriam-Webster, finds its equivalent in the word "shutdown" which is "a cessation or suspension of an operation or activity." This definition applies whether such cessation is of a permanent or temporary nature. There is little room for finding that Petitioner's removal was anything but a

dismissal, and was unlawful in light of the requirement under § 328 of the Act that "appointive personnel in the judicial system of the commonwealth shall continue to serve therein." (Italics added) Respondents have violated the law of non-contradiction in presenting their position to the Court: Poignantly, they stated to the Court of Appeals below:

> "It is undisputed that Whalen was not subjected to a removal for cause but was laid off for budgetary reasons.... Whalen's layoff was not based strictly on seniority, but it was also not based on any perceived inadequacy..."

Respondents' Brief, at pp. 10-11

Yet, Respondents have stated in the same Brief:

> "Whalen was one among three selected for layoff, based upon "such factors as prior discipline, attendance, work product and other relevant factors.

Respondents' Brief, at pg. 4.

The Judges would have the Court accept that the Petitioner's removal from office ... was not for cause, but was for cause. The reasons set out immediately above, "prior discipline," "attendance," "work product," and "other relevant factors" are indicative of for-cause removal. Such removal requires a pre-termination, pre-layoff hearing, which was not afforded to the Petitioner. Post-layoff remedies that may have been available to the Petitioner are irrelevant for the purposes of qualified immunity analysis where Respondents have violated an express right to a pre-removal hearing before a detached committee. The Respondents cannot, Petitioner respectfully suggests, have it

both ways, as they would like. Even if the "reasonable official" standard were applied in this case, rather than the "reasonable judge" which Petitioner urges the Court to adopt, it still would be readily apparent, the logical irreconcilability of the two positions pled by the Respondents in this connection.

To avoid this conflict in logic, Respondents rely upon exigent financial circumstances as the causal factor supporting the Petitioner's being removed from office by layoff. This argument is also untenable. Of the three Assistant Clerks selected for layoff, the Petitioner was one of two actually laid off. One of the original three was retained, who had not at the time served for the minimum number of years called for by the appointing statute in order to enjoy any protection thereunder. An additional two Assistant Clerks who were vested under that statute, and who also served for a significant number of years less than Petitioner were also by-passed for removal. On or before September 10, 2002--three days prior to the effective date of Petitioner's removal, funds were identified and allocated to the Springfield District Court budget, by which means to retain one of the three positions originally slated for layoff. The fiscal situation of the Springfield Court had improved sufficiently to have recalled the Petitioner as early as March, 2003. Yet, once more, Petitioner was not restored to service at that time, but more than a year later after a successor Chief Justice for Administration and Management had taken office. If funding was the reason, and nothing else, for Petitioner's removal, then the Respondents acted in an arbitrary manner in removing the Petitioner from office.

According to the Court of Appeals, Respondents should have the burden of proving they were entitled to qualified immunity. See, *Dimarco-Zappa v. Cabanillas*, 238 F.3d 25, 35 (1st Cir. 2001). That did not seem to be required in this case. No hearing was conducted by the District Court for such a purpose, nor was a Record created for review. It was both unjust and a violation of Federal Rule for the District

Court to have dismissed the case by means of summary judgment with respect to the question of qualified immunity. F.R.C.P. 56 precludes such cavalier treatment in a context where genuine and triable issues of fact and law are present. It was error, for all the reasons stated above, for the Circuit Court of Appeals to have affirmed the District Court's dismissal of the case. The First Circuit's error in *Savard v. Rhode Island*, 338 F.3d 23 (1st Cir. 2003) was duplicated in the case at bar--as a result of the lower Courts' electing not to follow the established law of *Hope v. Pelzer*, 536 U.S. 741 (2002).

Amendment XI to the U.S. Constitution would ordinarily preclude injunctive relief against a state, See, *Ex Parte Young*, 209 U.S. 203 (1908). However, the law does not in all cases bar suits seeking prospective injunctive relief. See, *Rosie D. v. Swift*, 310 F.3d 230 (1st Cir. 2002). See also, *Fortin v. Commissioner of Mass. Department of Public Welfare*, 692 F.2d 790 (1st Cir. 1982). The Court in the latter case indicated that such relief did not breach the wall of sovereign immunity. There is no bar to a state's being required to compensate an injured party for constitutional transgression resulting in harm. See, *Milliken v. Bradley*, 433 U.S. 267, 53 L. Ed. 2d 745, 97 S.Ct. 2749 (1977).

The Decision of the Circuit Court of Appeals contains language, which if not clarified or reversed, would render the position of Assistant Clerk to be even more tenuous under the court's unfounded 'reorganization analysis' than it was prior to the inception of suit, an incongruous result not in keeping with the appointing statute on its face, nor with its legislative history. An Assistant Clerk-Magistrate holds an office that is not a Civil Service position as intimated by Respondents' referral to M.G.L. c. 31, § 1 at pg. 12 of their brief.

However the Respondents would like to have the Court interpret what is a layoff, there is no question that the Petitioner was removed from his office. He was instructed to surrender his building keys and court identification card.

The temporal nature of the removal is irrelevant. For all he knew, Petitioner would never again serve in the court. This was a calculated termination.

Petitioner assumed office relying upon the social contract, the promise contained within the words of the appointing statute. At no point did the Respondents inform Petitioner prior to the removal that it would be of limited duration, or that he had recall rights as a matter of law. Petitioner requested an Opinion of the Committee on Ethics for Clerks and Assistant Clerks of Court, a Committee established by and acting under the auspices of the Massachusetts Supreme Judicial Court as to whether or not the Petitioner was permitted to practice law subsequent to his removal: The Committee responded that it would not answer his question since he was no longer a state employee. Petitioner thought his career was ended. At forty-six, he must work until well near the age of eighty in order to enjoy retirement benefits that he otherwise would have been entitled to at or about age sixty. Petitioner would not have been forced to withdraw his retirement funds (with significant early withdrawal penalty) but for the illegal act of the Respondents. When Petitioner returned to the Court, he was required to pay a higher retirement contribution rate than that which he paid when removed. Also, by some administrative omission, Petitioner's long-term disability coverage was also not reinstated. Petitioner received a letter October 29, 2004 from the Human Resources Department of the Trial Court informing him that, as of that day, he was considered to be a "permanent" employee. That was six months after Petitioner's return to his "former" office. The inference to be drawn was that Petitioner's position, from March of 2004 to September, 2004 was considered something other than 'permanent.' Petitioner was, hence, not actually returned to his "former" position, as represented in Respondents' counsel's Motion to Dismiss for mootness, granted by the District Court Judge, and Petitioner's case is therefore not moot.

This case presents to this Honorable Court questions not only of law, but of fundamental fairness. Petitioner believes he is entitled to his day in court to seek redress of grievance of state action, even where Respondents are judges of lower, parallel courts. It is not meet for the reviewing and lower federal courts to act in such a manner as would suggest a situation consonant with that where the foxes were left guarding the henhouse. Judges are fallible, as are we all. Thus, their actions should not be presumed as being correct in all circumstances at all times. They can be politically motivated as commented on by Mr. Cox in his Committee's insightful Report. Petitioner should have the opportunity to test the motivations of the Respondents in a meaningful way, in a Court of Law, before an impartial Judge or Jury.

The Respondent Judges in this case knew fully well at the time they 'laid off' Petitioner from his office, that the removal was unconstitutional. At the least they knew that it was likely that, in light of the express language of the statute at issue, and the history surrounding it, that their action would likely trigger a constitutional violation. Judges who so act ought not be allowed the privilege of being shielded by the application of the doctrine of qualified immunity. Providing a hearing to the Petitioner would not have adversely impacted the Administration of the Courts. Additionally, Respondents could have sought an Advisory Opinion of the Supreme Judicial Court: They chose to do neither.

With each day that passes, the economic injury to the Petitioner continues, as he has not received his salary which by law was not to have been reduced. Additionally, each day that passes where Petitioner has not received credit for all his years of service represents a continuing violation of law, sufficient so as to justify by injunctive relief the payment over of due and rightful compensation, without offense to state sovereignty.

Petitioner asks this Honorable Court to note the sagacious words of Dissenting Panel Member, Senior Chief Justice Stahl of the Court of Appeals for the First Circuit:

> "At the time Whalen was targeted for layoff based on performance-related factors, the law was such that a reasonable officer, when selecting an employee for removal based on such factors, was on notice that such an employee was entitled to due process. The fact that budgetary constraints prompted the officials to evaluate Whalen's performance is irrelevant even in this "novel factual circumstance[]," the "officials [were] still on notice" that Whalen was entitled to some form of due process as soon as factors other than seniority were considered in his being selected for removal. See *Hope v. Pelzer*, 536 U.S. 730, 741, 153 L. Ed. 2d 666, 122 S. Ct. 2508 (2002).
>
> In their search through our precedent for a perfect factual match to the facts of this case, my brethren ignore the Supreme Court's clear direction in *Hope v. Pelzer* that "although earlier cases involving [*30] 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.* Indeed, this same error was made by four members of this court sitting en banc in *Savard v. Rhode Island*, 338 F.3d 23 (1st Cir. 2003) (Opinion of Selya, J.), when this Court evenly divided over the propriety of such a search for the perfect precedential match. The proper inquiry is "whether the state of the law [at the time of the action]

> gave [Appellees'] fair warning that their alleged treatment of [Whalen] was unconstitutional." See *Hope*, 536 U. S. at 741. And here, the answer is unequivocally yes."

Addendum, pg. 23.

The Judges who planned Petitioner's removal knew what they were doing when they were doing it. These Judges knew that what they were doing in removing Petitioner from office was a violation of his rights under the Federal Constitution. But, this did not concern them. These Judges, under the circumstances of this case, should not be given the benefit of doctrinal protection for the reason that they are judges. These officials ruined much of the Petitioner's economic life, depriving him of his office and nearly $200,000.00 in salary and retirement. The infliction of this kind and level of harm deserves to be more thoroughly reviewed by the state and federal Bench and given more thoughtful consideration than has been extended thus far to your humble Petitioner.

CONCLUSION AND PRAYER FOR RELIEF

This Honorable Court should uphold the Panel's finding that the Respondents violated Petitioner's right to Due Process under 42 U.S.C. § 1983, triggering a constitutional violation of Amendment XIV to the U.S. Constitution resulting in harm to the Petitioner. This Honorable Court should find that the First Circuit Court of Appeals erred in affirming the District Court's granting of qualified immunity to the Respondents, and also erred in affirming the District Court's dismissal of Petitioner's case for reason of mootness. This Honorable Court should find that Amendment XI to the U.S. Constitution does not preclude the Federal Courts from

prospectively enjoining the state of Massachusetts to compensate Petitioner, a statutorily protected, appointive judicial office-holder whose federal constitutional rights have been violated by Massachusetts State Court Judges. This Honorable Court should reaffirm that the mere existence of novel factual circumstances, especially where the Respondents are judges, do not relieve Respondents of the burden of establishing their entitlement to qualified immunity. This Honorable Court, in order to ensure consistent adherence and application of U.S. Supreme Court holdings in the First Circuit, as well as amongst the several Circuits, and in the interest of advancing fundamental notions of justice and traditional standards of fair play, should reverse the ruling of the First Circuit Court of Appeals on the issues of qualified immunity and mootness and remand the case to the District Court for further proceedings not inconsistent with this Court's Decision, and with its prior Decision set out in *Hope v. Pelzer*.

Petitioner respectfully asks that this Honorable Court grant his Petition for Writ of Certiorari to the Circuit Court of Appeals for the First Circuit, and for whatever other relief seems right, fair and just to This Honorable Court.

Respectfully submitted,

James M. Whalen, Petitioner
Pro Se
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West Springfield, Massachusetts 01089
(413) 736-2443

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES M. WHALEN,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action
	*	No. 02-12021-JLT
	*	
MASSACHUSETTS TRIAL COURT, et al.,	*	
	*	
	*	
Defendants.	*	

ORDER

June 30, 2004

TAURO, J.

Plaintiff has been reinstated to his former position as assistant clerk, making moot his demand for injunctive relief. This court has already granted the individual Defendants qualified immunity from damages. And, Defendant Massachusetts Trial Court and the individual Defendants in their official capacity are not "persons" and are, therefore, not subject to suit under 42 U.S.C. § 1983. In view of the above, this court hereby orders that:

1. Defendants' Motion to Dismiss on Grounds of Mootness [#33] is ALLOWED;

2. The question that this court certified to the Supreme Judicial Court for the Commonwealth of Massachusetts on November 17, 2003 is WITHDRAWN; and

3. The above-captioned action is now closed.

IT IS SO ORDERED.

/S/ Joseph L. Tauro
United States District Judge

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 04-1976

JAMES M. WHALEN,
Plaintiff, Appellant,

v.

MASSACHUSETTS TRIAL COURT; WILLIAM W. TEAHAN, JR., ROBERT F. KUMOR, BARBARA A. DORTCH-OKARA; ROBERT E. FEIN,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Torruella, Circuit Judge,
Coffin and Stahl, Senior Circuit Judges.

Harvey A. Schwartz with whom Laurie Frankl and Rodgers, Powers & Schwartz LLP were on brief for appellant.

Charles M. Wyzanski, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, was on brief for appellees.

February 4, 2005

COFFIN, Senior Circuit Judge. In September 2002, the Springfield (Massachusetts) District Court was obliged to lay off three of its nine assistant clerks because of a budget deficit. Appellant James Whalen, who had held his position since 1989, was one of the clerks chosen for layoff. He subsequently brought a federal civil rights suit against the Massachusetts Trial Court and four individuals, claiming that his procedural due process rights had been violated because he was given no opportunity to contest his selection for layoff. See 42 U.S.C. § 1983.[1] He sought damages against the individual defendants and injunctive relief against the Trial Court. The district court dismissed the case against the individual defendants based on qualified immunity and, after Whalen was reinstated to his position, dismissed the case against the Trial Court as moot. Whalen appeals both decisions.

In two respects, Whalen's claims require us to look beyond basic principles, first in considering the procedural due process rights associated with a budgetary termination, and second in considering the nature of the injunctive relief permitted against a state under *Ex Parte Young*, 209 U.S. 123 (1908). After careful review, we conclude that Whalen suffered a due process injury, but that the individual defendants properly were granted immunity because the law was not clearly established that he was entitled to a pre-termination hearing. Because we also conclude that the Eleventh Amendment bars a federal court from ordering the

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[1] The complaint also alleged a substantive due process violation, but that claim has not been pursued on appeal.

injunctive relief Whalen seeks, we agree with the district court that the remainder of the case should be dismissed as moot.

I. Background

After implementing a series of voluntary cost-saving measures in the summer of 2002, including reduced work weeks and extended leaves of absence, administrators for the Massachusetts Trial Court determined that their anticipated budget shortfall also required a number of involuntary layoffs. In the Springfield District Court, the "[i]nvoluntary personnel reductions" affected a total of twelve employees, including three of the then-nine assistant clerks. In an affidavit, the Trial Court's Personnel Administrator stated that the Chief Justice for Administration and Management ("CJAM"), Barbara A. Dortch-Okara, had "determined that managers had the discretion to consider such factors as prior discipline, attendance, work product and other relevant factors" in selecting the employees to be laid off.

Appellant Whalen received a letter from Dortch-Okara dated August 29, notifying him that, as a result of a budget shortfall, he had been selected for layoff effective September 13. The letter gave no reasons for his selection. It was accompanied by materials explaining the continuation of his health insurance benefits and the procedures for applying for unemployment compensation. At least two of the assistant clerks retained by the court had less seniority in the position than appellant. Before the layoff went into effect, additional funding became available and one of the other assistant clerks selected for layoff was retained. That employee had held his job for less than three years.

The tenure and termination of assistant clerks is addressed by two Massachusetts statutes. Under Mass. Gen. Laws Ann. ch. 218, § 10, an assistant clerk who has held his position for three years before the effective date of the act "shall hold office during good behavior," subject to applicable retirement laws. The provision goes on to state

that such an employee may be removed from office under procedures authorized by Mass. Gen. Laws Ann. ch. 211B, § 8. Section 8 provides that an employee covered by the provision "may be removed for cause." Such a removal must be reviewed by the advisory committee on personnel standards and is not final until approved by the committee. Covered employees who have served three full years in a position have the right to appear personally before the committee before it renders a decision.

In his complaint, Whalen contended that these provisions gave him a protected property interest in his job and that the Fourteenth Amendment's guarantee of due process thus entitled him to notice of the reasons why he was selected for layoff and a pre-termination opportunity to respond to the reasons given. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 101-02 (lst Cir. 2002).[2] He sought monetary damages from four individuals -- two justices of the Springfield District Court, the clerk of that court, and CJAM Dortch-Okara -- and an injunction ordering the court to reinstate him with back pay and benefits.

The defendants initially argued that Whalen did not have the requisite three years of service to qualify for section 10's tenure protection,[3] but abandoned that argument and conceded that "plaintiff's length of service was sufficient to qualify him" under the statute. They maintained, however, that he was not entitled to the procedures outlined in section 8 of chapter 211B because the provision applies only to removal for cause and not layoff. Moreover, the individual

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[2] He also claimed that his rights were violated because the statutory procedures were not followed. As we note below, a plaintiff is not necessarily entitled, as a matter of federal due process, to all of the procedures provided by state law. See infra at p. 13 n.6; see also *Bellville v. Town of Northboro*, 375 F.3d 25, 31 (1st Cir. 2004) ("The states, of course, are free to accord their citizens rights beyond those guaranteed by federal law.").

[3] They asserted that the statute covered only employees who had been in the position for three years at the time the Court Reorganization Act was passed in 1978.

defendants claimed the shield of qualified immunity, arguing that Whalen did not have a clearly established constitutional right to a hearing before a budget-driven termination of his position and, indeed, had no right to such a hearing at all.

Without articulating its reasons, the district court granted immunity to the individual defendants. It then certified to the Massachusetts Supreme Judicial Court the question whether section 8's procedural requirements apply to an assistant clerk who is terminated when the court reduces the total number of such positions for budgetary reasons. In March 2004, while that question was pending before the SJC, Whalen was reinstated. In June, the defendants moved to dismiss the remainder of the case, which involved only injunctive relief, as moot. The district court granted the motion over Whalen's objection and ordered the certification question to be withdrawn from the SJC.

On appeal, Whalen challenges both the grant of qualified immunity to the individual defendants and the mootness ruling. He claims that his constitutional right to some kind of pre-termination process was clearly established, and that reasonable court officials would have understood that the property right he held in his position entitled him to notice of the reasons he was selected for layoff and an opportunity to respond. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (explaining qualified immunity inquiry); *Mihos v. Swift*, 358 F.3d 91, 102 (1st Cir. 2004) (same). He further maintains that his demand for injunctive relief did not become moot upon his reinstatement because he still seeks restoration of credit toward his retirement and pension benefits for the time he was out of work.

We consider each of these issues in turn.

II. Qualified Immunity

Guided by Supreme Court precedent, we have consistently applied a three-part test for evaluating an official's claim to qualified immunity. *Riverdale Mills Corp.*

v. Pimpare, 392 F.3d 55, 60-61 (1st Cir. 2004); *Mihos*, 358 F.3d at 102; *Suboh v. Dist. Attorney's Office*, 298 F.3d 81, 90 (1st Cir. 2002); see also *Hope v. Pelzer*, 536 U.S. 730, 735-36 (2002); *Harlow*, 457 U.S. at 818-19. We first consider whether the plaintiff's allegations, if true, establish a constitutional violation. *Hope*, 536 U.S. at 736; *Mihos*, 358 F.3d at 102. The second question is whether the right was clearly established at the time of the alleged violation. *Suboh*, 298 F.3d at 90. Finally, we ask whether a similarly situated reasonable official would have understood that the challenged action violated that right. *Mihos*, 358 F.3d at 102; *Suboh*, 298 F.3d at 90. We review qualified immunity determinations de novo, at least to the extent they turn on issues of law. *Mihos*, 358 F.3d at 102; see also *Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985).[4]

A. Do the allegations add up to a constitutional violation?

Whalen contends that he had a property right in continued employment that was created by state law and that, consequently, he had a right to procedural due process that was violated when he was given neither notice of the specific reasons for his layoff nor opportunity to respond. We agree that these allegations generally describe a constitutional injury and conclude, for reasons we shall explain, that the constitutional claim remains viable even when examined more particularly.

Our court consistently has held that an employee who under state law can be terminated only for "just cause" has a constitutionally protected property interest in his employment. See, e.g., *Wojcik*, 300 F.3d at 102; *Cronin v. Town of Amesbury*, 81 F.3d 257, 260 n.2 (1st Cir. 1996); *Perkins v. Bd. of Dirs.*, 686 F.2d 49, 51 (1st Cir. 1982); see also *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997) ("[W]e

[4] Where, as here, the district court offered no rationale for its decision, our review obviously must be plenary.

have previously held that public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process."); *Loudermill*, 470 U.S. at 538-39 (property right to continued employment created by statute that gave "'classified civil service employees'" the right "to retain their positions 'during good behavior and efficient service,'" with dismissal conditioned on "'misfeasance, malfeasance, or nonfeasance in office'"). The two Massachusetts statutes at issue here, certainly when taken together, fit this model, specifying that an assistant court clerk has the right to retain his position "during good behavior" and to be removed only "for cause." See supra p. 4 (discussing Mass. Gen. Laws Ann. ch. 218, § 10 and ch. 211B, § 8).

Relying on the Supreme Court's decision in *Bishop v. Wood*, 426 U.S. 341 (1976), defendants assert that the Massachusetts statutes, rather than creating an enforceable expectation of continued employment, simply set out procedures to govern removal of employees. In Bishop, the Supreme Court accepted the interpretation of a local ordinance by a North Carolina judge who had concluded that an employee was terminable at will, even though the applicable ordinance "[o]n its face . . . may fairly be read as conferring . . . a guarantee" to continued employment. See *id.* at 345. The Court noted that it had in the past accepted an interpretation of state law in similar circumstances "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Id.* at 346.

No such contrary interpretation of the Massachusetts statutes has been cited by defendants in this case, and their reliance on Bishop is therefore misplaced. We see no basis upon which to depart here from our ordinary conclusion that a guarantee of tenure in the absence of "good cause" for removal creates a constitutionally protected property interest. Whalen thus had a property right to continued employment as an assistant clerk.

Whether that property interest gave rise to a right to procedural due process, however, is another matter. Although a property right and procedural due process typically go hand-in-hand triggering a requirement for "some kind of a hearing" before discharge, *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 & n.7 (1972) we have recognized a limited "reorganization exception" to due process that eliminates the need for a hearing where a reorganization or other cost-cutting measure results in the dismissal of an employee. See *Duffy v. Sarault*, 892 F.2d 139, 147 (lst Cir. 1989); see also *Misek v. City of Chicago*, 783 F.2d 98, 100-01 (7th Cir. 1986); *Hartman v. City of Providence*, 636 F. Supp. 1395, 1409-10 (D.R.I. 1986) (Selya, J.); cf. *Milne v. Sch. Comm. of Manchester*, 381 Mass. 581, 582-83 & n.3 (1980) (statutory notice and hearing requirements inapplicable to dismissal of tenured teacher due to decline in enrollment).[5] Defendants assert that, even if Whalen has a property right, this precedent establishes that no constitutional violation occurred. Additionally, defendants contend that Whalen was not "removed" from his job for cause, but merely laid off, and so the due process procedures were not triggered.

Defendants' arguments would have considerable force if an entirely neutral layoff were at issue, i.e., if the layoff decision were unrelated to individual qualifications. The case law that requires a pre-termination hearing for an employee with a state-protected property interest in his job reflects "a balancing of the competing interests at stake" when an employee with a legitimate claim to permanence faces a "for cause" loss of his position. See *Loudermill*, 470 U.S. at 542. The government's interests in "the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens" are countered not only by the employee's significant interest in retaining employment but

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[5] A plausible claim that the asserted reorganization was pretextual would warrant further inquiry. See *Misek*, 783 F.2d at 100-01; *Hartman*, 636 F. Supp. at 1416-17; see also *Duffy*, 892 F.2d at 147; cf. *Milne*, 381 Mass. at 583 n.3.

also by the interest in avoiding an erroneous termination. *Id.* at 542-43.

> [S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. . . . Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

Id. at 543.

When the termination at issue is "in good faith directed at positions rather than individuals," *Hartman*, 636 F. Supp. at 1409, however, the hearing contemplated by the Supreme Court's due process precedent loses its relevance. "In such cases, since there are no charges against the employee . . . involved, there would be no occasion for a hearing, and it would be idle to hold one." *Kusza v. Maximonis*, 363 Pa. 479, 482-83, 70 A.2d 329, 331 (1950) (quoted in *Hartman*, 636 F. Supp. at 1411). In addition, because reorganizations often affect numerous employees, the governmental interest in efficient administration may weigh more heavily in such circumstances. See, e.g., *Mayfield v. Kelly*, 801 F. Supp. 795, 798 (D.D.C. 1992) ("A RIF [reduction-in-force] involves a large number of employees . . . for whom it is impossible to have pre-termination hearings.") (quoted in *Wash. Teachers' Union Local #6 v. D.C. Bd. of Ed.*, 109 F.3d 774, 780 (D.C. Cir. 1997)).

Under this precedent, if the Trial Court had in good faith eliminated the position of assistant clerk, Whalen clearly would have no constitutional claim. Similarly, if the three

assistant clerks originally selected for layoff had been chosen entirely based on factors unrelated to personal performance for example, seniority or job location the "reorganization exception" case law would be on point. Likewise, the distinction that defendants draw between a "removal for cause" and a "layoff" the latter connoting an absence of performance factors would be pertinent if Whalen's selection had been directed solely at his position rather than at him. See Mass. Gen. Laws Ann. ch. 31, § 1 (a "layoff" is "a temporary discontinuance of employment for lack of work or lack of money").

Here, however, the record indicates that performance factors played a role in Whalen's selection for layoff. As noted above, CJAM Dortch-Okara authorized managers to take into account a variety of qualitative factors in choosing which three assistant clerks to lay off. Those individualized considerations took on even greater significance for Whalen when funds became available to retain one of the three clerks initially selected for termination, and he was passed over in favor of someone with considerably less experience who even lacked sufficient tenure to claim a property interest in his job. On these facts, it seems inescapable that Whalen's job performance was a deciding factor in his selection. And certainly, for purposes of considering the legal questions before us, we must presume that that was so.

Consequently, we conclude that Whalen had a right to the minimal procedural protections of notice and an opportunity to respond. As the Supreme Court has observed, the requisite procedures "need not be elaborate," *Loudermill*, 470 U.S. at 545, and the opportunity to hear and respond to the employer's reasons could be accomplished either in writing or in an informal face-to-face meeting, *id.* at 546.[6] It

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[6] As a matter of federal due process, Whalen is not necessarily entitled to the procedures spelled out in Mass. Gen. Laws Ann. ch. 211B, § 8. Although a property right in employment must arise from state law, what process is due is a question of federal law. *Loudermill*, 470 U.S. at 541. We need not, and do not, consider the remedy available for violation of his statutory procedural rights. See *O'Neill v. Baker*, 210 F.3d 41, 49 n.9 (1st Cir. 2000) (noting that "claims[]

is "fundamental," *id.*, however, that some process is due when an employee with a protected property interest in his job is terminated in a "person-directed rather than position-directed personnel action[]," *Hartman*, 636 F. Supp. at 1412.[7]

We thus conclude that Whalen satisfied the first prong of the qualified immunity inquiry by stating a constitutional due process violation.

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involving state procedural guarantees that are above and beyond constitutional due process requirements" are not properly before a court examining an alleged deprivation of a plaintiff's federal due process rights).

We also do not address in this opinion whether due process may in some instances "require more than a simple opportunity to argue or deny" the employer's reasons for dismissal, *Loudermill*, 470 U.S. at 552 (opinion of Brennan, J., concurring in part and dissenting in part). See *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

[7] The DC Circuit reached a seemingly contrary conclusion in *Wash. Teachers' Union Local #6*, 109 F.3d at 774, where it held that due process did not require pre-termination hearings for more than 400 teachers who lost their jobs in a reduction-in-force ("RIF") even though the teachers were ranked in part by their principals based on performance. The court highlighted the burden that would be imposed on the school district by pre-termination proceedings for so many individuals, *id.* at 781, and minimized the value of giving teachers an opportunity to respond to the principals' rankings because "principals enjoyed near-total discretion in ranking their teachers and because the record contains no evidence that factual errors occurred," *id.* at 780.

Union Local #6 may be factually distinguishable. The court's opinion does not indicate how the 400 layoffs were distributed among the district's schools and whether some principals faced substantial staff reductions. Here, it appears that the supervisor who selected the assistant clerks for layoff would have needed to meet briefly with only three employees. We are unpersuaded that this minimal process would have been unduly burdensome. Moreover, Whalen was given no explanation for his selection; the teachers in Union Local #6 had been given an opportunity to review and sign the ranking forms used to effectuate their RIF. See *id.* at 777-78.

To the extent the D.C. Circuit relied on the discretionary nature of the teachers' rankings to discount the need for pre-termination process, we disagree. We note that the Supreme Court has recognized that a pre-termination "opportunity to invoke the discretion of the decisionmaker" can be of value even in the absence of factual errors. See *Loudermill*, 470 U.S. at 543.

B. The "Clearly Established Right" and "Reasonableness"

It is beyond debate that, as a general matter, the constitutional right to due process claimed by Whalen was clearly established at the time he was laid off. As we have discussed, the law was unequivocal in 2002 that an employee with a property interest in his employment was entitled to pre-termination notice of the reasons for his performance-based discharge and an opportunity to respond.

But the inquiry into whether a right is clearly established ""must be undertaken in light of the specific context of the case, not as a broad general proposition,"" *Mihos*, 358 F.3d at 109 (quoting *Suboh*, 298 F.3d at 93 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001))); see also *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004); *Riverdale Mills Corp.*, 392 F.3d at 65-66, and this is not a standard performance-based dismissal case. At the threshold level, the motivation behind Whalen's termination was budgetary. It is undisputed that, without the fiscal crisis, Whalen would not have been targeted for dismissal, and, indeed, once the crisis passed he was reinstated. As the defendants have pointed out, this was not a termination intended to sever an employment relationship but a layoff accompanied by recall rights in the event fiscal conditions improved. In these circumstances, there is at least some merit to the defendants' argument that the procedural protections outlined in section 8 (of chapter 211B) for a removal "for cause" are inapplicable. Indeed, before it dismissed the case as moot, the district court certified that issue to the Massachusetts Supreme Judicial Court.[8]

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[8] The court asked the following question of law in its certification order: "When a Massachusetts District Court reduces the total number of assistant clerks for budgetary reasons, must the termination of a District Court assistant clerk who has held his position for more than three years since the enactment of M.G.L. c. 218 § 10 be done in accordance with the procedures of M.G.L. c. 211B § 8?" This formulation of the question was proposed by Whalen.

Although the applicability of the procedural protections specified in section 8 does not determine Whalen's federal due process rights, the uncertainty reflected by the certification is relevant to our inquiry. The statute, in conjunction with ch. 218, § 10, appears to confer procedural protections on the same group of assistant clerks who possess a federal constitutional right to due process, i.e., those who have held their jobs for at least three years. If we cannot say with assurance that the statutory procedures are intended to apply in Whalen's circumstances and, like the district court, we cannot it would be a stretch to conclude that Whalen had a clearly established right to the notice and hearing afforded by the Fourteenth Amendment. The differences we have noted between the circumstances here and the typical termination-for-cause complicate matters in both settings.

But whether or not we proclaim the right clearly established in the specific context of this case, the outcome of our immunity inquiry would be the same because defendants inevitably would prevail at the third step of the analysis.[9] We believe an objectively reasonable Massachusetts official could have drawn the conclusion albeit incorrectly that a budget-driven layoff effectuated by reference to performance is nonetheless a budget-driven layoff, and thus exempt from the procedural requirements applicable to terminations for cause. Although we have now clarified that due process requires that an employee who holds a property right in his job be given notice and opportunity to respond whenever he is terminated in a "person-directed rather than position-directed personnel action[]," *Hartman*, 636 F. Supp. at 1412, a reasonable official could have taken into account the possibly (and ultimately) temporary nature of Whalen's termination and

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[9] We note that, on occasion, we have combined the second and third prongs of the qualified immunity analysis into a single step. *Riverdale Mills Corp.*, 392 F.3d at 60 n.5 (citing *Tremblay v. McClellan*, 350 F.3d 195, 199-200) (1st Cir. 2003)).

the financial crisis that triggered it to conclude that the *Loudermill* line of cases was not implicated.

Certainly, in terms of future employment, a budgetary layoff is likely to have less drastic consequences than a classic termination-for-cause; an official focusing on the "layoff" label and the nature of the harm, against the backdrop of the "reorganization exception," reasonably may have miscalculated in weighing the competing interests. See *Gilbert*, 520 U.S. at 932 ("[W]hile our opinions have recognized the severity of depriving someone of the means of his livelihood, . . . they have also emphasized that in determining what process is due, account must be taken of 'the length' and 'finality of the deprivation.'") (citations omitted). In sum, because we believe an objectively reasonable official in the defendants' position would not necessarily have understood that his action violated the plaintiff's rights, we hold that the district court properly granted qualified immunity to the individual defendants.[10]

III. Mootness

Whalen also disputes the district court's ruling that his case became moot once he was reinstated to his position in March 2004, arguing that he remained entitled to pursue injunctive relief to restore his pension and retirement credit for the approximately eighteen months he was out of work. Defendants argue that such relief is prohibited by the Eleventh Amendment, which generally bars suits in federal court against unconsenting states. See *Rosie D. ex rel. John*

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[10] We wish to emphasize that the factors distinguishing Whalen's circumstances from a typical budgetary layoff while perhaps leading a reasonable official astray do not in this case lead to a different balance of the competing interests identified in *Loudermill*. As we have noted, the administrative burden in providing explanation to the affected assistant clerks would have been slight, and there was no need for the "expeditious removal" of an unsatisfactory employee. On the other hand, the employee's interest in retaining employment and the joint interest in avoiding erroneous decisions remain high.

D. v. Swift, 310 F.3d 230, 234 (1st Cir. 2002). The prohibition extends to suits against state officials acting in their official capacities, *id.*, and it is for that reason that Whalen sought back pay and other monetary relief only from the court officials in their individual capacities.[11]

In Ex Parte Young, however, the Supreme Court carved out an exception to Eleventh Amendment state immunity that allows federal courts to "enjoin state officials to conform their future conduct to the requirements of federal law," *Quern v. Jordan*, 440 U.S. 332, 337 (1979). See also *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). The Court has described the difference between permissible and impermissible relief as "the difference between prospective relief on one hand and retrospective relief on the other." *Quern*, 440 U.S. at 337.

Whalen suggests that restoration of his service credit qualifies as prospective injunctive relief because he seeks only future recognition of his length of tenure to establish his retirement eligibility and pension benefits. We disagree that this meets the *Ex Parte Young* standard.

Before we explain that conclusion, we sidestep briefly to note that the Eleventh Amendment may not be the only barrier Whalen faced. A plaintiff's entitlement to more than nominal damages in a procedural due process case turns on whether the constitutional violation the failure to provide a pre-termination opportunity to contest termination did in fact cause the harm asserted the loss of the job and related benefits. If Whalen would have been terminated even after a proper hearing, he would not be eligible for either reinstatement or damages flowing from his unemployment. See *Carey v. Piphus*, 435 U.S. 247, 260 (1978); *Brewer v. Chauvin*, 938 F.2d 860, 862-64 (8th Cir. 1991) (en banc); *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987); *Rodriguez de Quinonez v. Perez*, 596 F.2d 486, 491 (1st Cir. 1979).

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[11] Our holding in Section II that the individuals are entitled to qualified immunity eliminates that avenue of relief.

We need not consider the issue of cause, however, because even if Whalen would have avoided layoff if he had had an opportunity to address the reasons for his selection, all available remedies are foreclosed in this case by the combined force of the Eleventh Amendment and principles of qualified immunity. As we have explained, the Eleventh Amendment bars monetary awards against the Trial Court itself, and the individuals are likewise protected from money damages by qualified immunity. Reinstatement already has occurred outside the litigation.

We can understand why Whalen insists that the remaining remedy restoration of credit for his time out of work falls into the category of prospective relief. He seeks no monetary reward, and his request would have only future impact on the state. But timing is not the sole inquiry under *Ex Parte Young*. The pivotal question is whether the relief "serves directly to bring an end to a present violation of federal law." *Papasan v. Allain*, 478 U.S. 265, 278 (1986); see also *id.* at 277-78 ("Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past . . . ."). Relief that is "tantamount to an award of damages for a past violation of federal law, even though styled as something else," is barred. *Id.* at 278.

The difference is not always obvious. "As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex Parte Young* will not in many instances be that between day and night." *Edelman*, 415 U.S. at 667; see also *Papasan*, 478 U.S. at 278 ("For Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct[.]"); cf. *Florida v. Long*, 487 U.S. 223, 238 (1988) ("The distinction between retroactive and prospective relief is not always self-evident.").

We are persuaded that, despite the forward-looking nature of Whalen's request for service credit, such relief would "in

essence serve[] to compensate" him for past injury, *Papasan*, 478 U.S. at 278. Even as a matter of vocabulary, the "restoration" of credit is designed to give him back something he lost when he was terminated unlawfully. Although reinstatement, too, involves a "restoration" of rights, it differs because termination without due process is the very unlawful act at issue; reinstatement pending a hearing thus "serves directly to bring an end to a present violation of federal law," id. By contrast, restoring credit for time lost due to a past termination has no impact on an ongoing violation.

We therefore conclude that the Eleventh Amendment bars a federal court from ordering restoration of Whalen's service credit. See *Mansour*, 474 U.S. at 71 ("Because there is no continuing violation of federal law to enjoin in this case, an injunction is not available."). Because no further relief was available, the district properly dismissed the case as moot.

Affirmed.

Dissent follows.

STAHL, Senior Circuit Judge (Dissenting). At the time Whalen was targeted for layoff based on performance-related factors, the law was such that a reasonable officer, when selecting an employee for removal based on such factors, was on notice that such an employee was entitled to due process. The fact that budgetary constraints prompted the officials to evaluate Whalen's performance is irrelevant--even in this "novel factual circumstance[]," the "officials [were] still on notice" that Whalen was entitled to some form of due process as soon as factors other than seniority were considered in his being selected for removal. See *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In their search through our precedent for a perfect factual match to the facts of this case, my brethren ignore the Supreme Court's clear direction in *Hope v. Pelzer* that

"[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.* Indeed, this same error was made by four members of this court sitting en banc in *Savard v. Rhode Island*, 338 F.3d 23 (1st Cir. 2003) (en banc) (opinion of Selya, J.), when this Court evenly divided over the propriety of such a search for the perfect precedential match. The proper inquiry is "whether the state of the law [at the time of the action] gave [Appellees] fair warning that their alleged treatment of [Whalen] was unconstitutional." See *Hope*, 536 U.S. at 741. And here, the answer is unequivocally yes.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 04-1976

JAMES M. WHALEN
Plaintiff - Appellant

v.

MASSACHUSETTS TRIAL COURT; WILLIAM W. TEAHAN, JR., individually and in his official capacity; ROBERT F. KUMOR, individually and in his official capacity; BARBARA A. DORTCH-OKARA; individually and in her official capacity; ROBERT E. FEIN, individually and in his official capacity
Defendants - Appellees

ORDER OF COURT
Entered: March 10, 2005

Before
Chief Judge Boudin, Senior Circuit Judge Coffin, Senior Circuit Judge Stahl, Circuit Judge Torruella, Circuit Judge Selya, Circuit Judge Lynch, Circuit Judge Lipez, and Circuit Judge Howard

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The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not

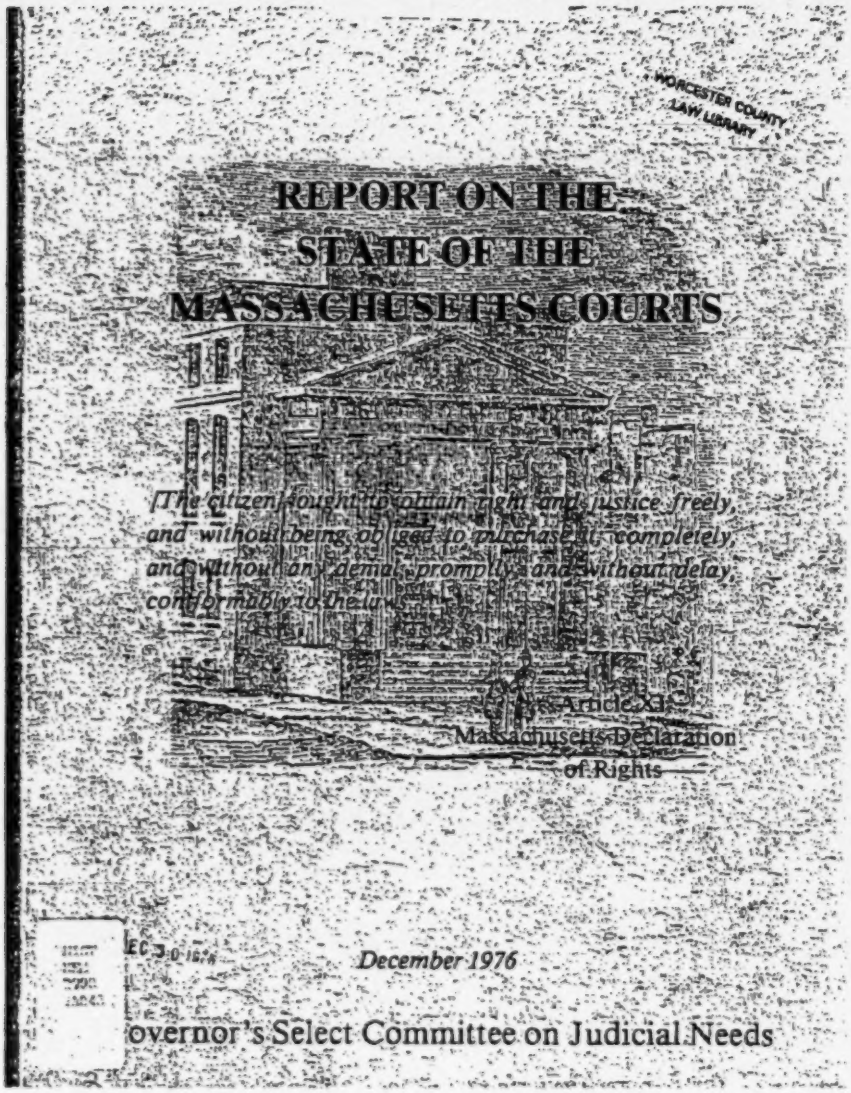
having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk

By: /s/
Chief Deputy Clerk

APPENDIX D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